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No. 02-263

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

BTA OIL PRODUCERS, ET AL.,
Petitioners,

v.

MDU RESOURCES GROUP, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH DAKOTA SUPREME COURT

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Two groups of Respondents—MDU Resources Group, Inc. and Williston Basin Interstate Pipeline Company (collectively "MDU") and Koch Industries, Inc. and Koch Hydrocarbon Company (collectively "Koch") each submitted Briefs in Opposition to the Petition for Writ of Certiorari. The Petitioners hereby submit their Reply Brief. For the reasons stated below, MDU's and Koch's Oppositions are unmeritorious, and the Petition for Writ of Certiorari should be granted.

1. THE PETITIONERS PROPERLY RAISED IMPORTANT FEDERAL QUESTIONS IN THE STATE COURT PROCEEDINGS BELOW.

Both MDU and Koch allege that the Petitioners did not timely raise federal issues in the state court proceedings. This is incorrect.

In their Petition for Rehearing, the Petitioners expressly asserted that the North Dakota state court determination that they had no causes of action for unjust enrichment and implied trust deprived them of equal protection and due process of law, as afforded by Section 1 of the Fourteenth Amendment of the U.S. Constitution, because it irrationally enables MDU to retain many millions of dollars of damages resulting from its breaches of contract contrary to well-established principles of restitution, to the benefit of the primary utility in North Dakota, and to the detriment of gas producers which are neither incorporated in nor have their principal places of business there. Appendix G-2. Therefore, in the underlying state court proceedings, the Petitioners raised important federal questions concerning the Constitution of the United States. The significance of

those questions is greatly enhanced here, because literally hundreds of millions of dollars hang in the balance. In an Order dated May 17, 2002, the North Dakota Supreme Court stated that "having considered the matter" it "denied" the Petition, notwithstanding a partial dissent from one of the five justices. Appendix F-1 and 2.

In *Illinois v. Gates et Ux.*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), this Court clarified that it could appropriately entertain federal issues which were either "presented or decided in the highest court of the state whose judicial action we are called upon to review." 462 U.S. 219. (emphasis added.) As explained above, the Petitioners undeniably "presented" federal issues in their Petition for Rehearing, which is alone sufficient to justify review under *Gates*. *See also Bankers Life & Casualty Co. v.* Crenshaw, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988).

MDU and Koch assert, however, that even if the Petitioners have raised a federal issue, they failed to do so on a timely basis under North Dakota state law, so this Court should not entertain their Petition for Writ of Certiorari. However, in its Opposition MDU acknowledges that N.D.R.App.P. 40 entitles the Petitioners to have asserted on rehearing any point of law that the North Dakota Supreme Court previously "overlooked," and it acknowledges that there is not a single North Dakota authority for the proposition that the Petitioners untimely raised their constitutional arguments on rehearing pursuant to that rule. MDU Opposition at 4-5. Because Petitioners timely presented their contentions in accordance with Rule 40, MDU's and Koch's arguments that the contentions were late fails.

MDU and Koch also contend that Petitioners did not timely make their assertions, because they were not presented at the trial court level. However, N.D.R.App.P. 40 is controlling, so compliance with it is sufficient. Further, there is no statute or court rule in North Dakota which prohibits an appellate court from entertaining contentions which were not made at the trial court level. *See Hathorn v. Lovern*, 457 U.S. 255, 264, 102 S.Ct. 2421, 72 L.Ed2d 824 (1982).

Moreover, this Court stated in *Hathorn* that even if such a procedural rule existed, a petitioners' failure to comply with "a state procedural ground is not adequate (to deny review) unless the procedural rule is 'strictly or regularly followed.'" 457 U.S. 263. As MDU acknowledges in its Opposition, the strongest statement that can be made about North Dakota law is that, "Issues not raised in the trial court, even constitutional issues, generally will not be addressed on appeal by the North Dakota Supreme Court." MDU Opposition at 5 (emphasis added.) Thus, the North Dakota rule of preclusion is not "strictly or regularly followed," as required by *Hathorn*.

To the contrary, in fact, the North Dakota Supreme Court has expressly recognized exceptions to the general rule of preclusion, such as where there has been an "obvious error" below. *See, e.g., State of North Dakota v. Martin*, 636 N.W.2d 447 (N.D. 2001) and *State of North Dakota v. Lang*, 463 N.W.2d 648 (N.D. 1990). It has also openly acknowledged that despite its general rule, it has the authority to address issues not raised in the trial court, but that it will exercise such authority "cautiously, " such as where a party "has suffered serious injustice." *State of North Dakota v. Mertz*, 514 N.W.2d 662 (N.D. 1994). Moreover, both

the "obvious error" and the "serious injustice" exceptions apply here.

Furthermore, in this very case, the North Dakota Supreme Court's order on rehearing expressly states that it "considered" and "denied" the contentions which were made. Thus, the rehearing order establishes not only that there is no "strict" and "regular" rule of preclusion under North Dakota law, but that none was followed here.[1]

Moreover, as discussed above, even if a petitioner did not timely raise an issue, it is sufficient to justify review if the state court decided it. *Mallett v. North* Carolina, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901). Here, the North Dakota Supreme Court expressly stated in its order that it had both "considered" the issues raised in the Petition for Rehearing, and that it decided those contentions by "denying" them. Therefore, both alternative grounds for review under *Gates* and *Crenshaw* are satisfied.

A court has "decided" a matter when it explicitly states that it has "considered" it and "denied" it. *Williams v. U.S.*, 122 S.Ct. 1221, 152 L.Ed.2d 153 (2002), *Immigration and Naturalization Service v. Doherty*, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992), *U.S. Parole Comm. v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). Because there is no blanket prohibition in North Dakota upon an appellate court entertaining contentions that were not made below, since there are well-recognized exceptions, and

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[1] The rehearing order in this case significantly did not state that the North Dakota Supreme Court was dismissing Petitioners' contentions because they had not been made at the trial court level, but it states that it had "considered" the contentions made and was "denying" them.

because the North Dakota Supreme Court affirmatively stated that it had considered the Petition for Rehearing and had denied it, this is not a case in which this Court should determine that a state supreme court has denied discretionary review. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 118 L.Ed.2d 153.

Alternatively, under *Yee*, this Court is entitled to consider this Petition even assuming arguendo that if the Petitioners are making claims that were neither raised nor addressed below, because "extraordinary circumstances" exist here. 503 U.S. 533. Moreover, this Court has entertained contentions on writ of certiorari review even if they were neither presented nor decided in the state court—in at least one case on review of another decision by the North Dakota Supreme Court. *Woods v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981), and *Three Affiliated Tribes v. Wold Engrg.*, 476 U.S. 871, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986). For all these reasons, Petitioners' contentions were adequately presented and decided below to justify review by this Court.

2. STATE COURT ACTION DENIED PETITIONERS THEIR CAUSES OF ACTION AND CONTRACT RIGHTS.

MDU also argues that the Petition for Writ of Certiorari should be denied, because the Petitioners had no causes of action or contract rights that have been denied by state action. This argument is circular, unduly semantic, and demonstrably premature. The Petitioners did not bring their claims against MDU based on direct contracts. Rather, Petitioners sued MDU for unjust enrichment and implied trust, which are a form of implied or quasi-contract. 17 C.J.S. Contracts, Section 6. The North Dakota Supreme Court

decided that Petitioners do not have any causes of action against MDU, which effectively means that they do not have an enforceable implied or quasi-contract. Appendix A-11 to 13. The issue before this Court is whether this state court determination is violative of the U.S. Constitution. Therefore, MDU's argument that the Petitioners have no causes of action or contract rights erroneously puts the cart before the horse, is circular, and is certainly premature, because it incorrectly assumes that the state court determination under review will be upheld.

3. THE STATE'S DENIAL OF PETITIONER'S CAUSES OF ACTION AND CONTRACT RIGHTS WAS ARBITRARY, CAPRICIOUS, AND INVIDIOUS.

MDU additionally asserts that it was not arbitrary and capricious for the North Dakota Supreme Court to have denied Petitioners their causes of action and contract rights. Koch significantly does not even make this argument. MDU's claim is erroneous.

To briefly recapitulate, Petitioners had contracts to sell their gas to Koch, which had contracts to resell the processed or residue gas to MDU. Koch has mischaracterized its contracts with MDU as "take-or-pay" contracts under which MDU would have had the option of purchasing the contract quantity of gas or alternatively refusing deliveries and paying for it. Koch Opposition at 1. Instead, the primary "McKenzie Contract" contained "take-and-pay" provisions which obligated MDU to purchase the contract quantities of gas from Koch. *Koch v. MDU*, 988 F.2d 1534. Thus, MDU was contractually obligated to purchase the gas that Petitioners had contracted to sell to Koch, or alternatively at least to pay for it.

Both the trial court and the Eighth Circuit determined in *Koch v. MDU* that MDU breached its contracts with Koch by failing to honor these obligations. 988 F.2d 1533, 1535, and 1537. If MDU had fulfilled its contractual obligations to Koch, it would have paid Koch for Petitioners' gas, and they would have received many millions of dollars more under their percentage of proceeds and similar contracts with Koch. Accordingly, MDU affirmatively represented in *Koch v. MDU* that the gas producers bore 75% of the resulting losses under their percentage of proceeds and similar contracts with Koch, and MDU's liability was decreased by 75% as a result. Appendix H-10.

The Petitioners assert that it was arbitrary, capricious, and invidious for the North Dakota Supreme Court to have decided that the Petitioners had no available causes of action to recover their losses from MDU under legal theories such as unjust enrichment. MDU acknowledges that the purpose of unjust enrichment is restitution, but in order to urge affirmance, it attempts to rely on a section from Dan B. Dobbs, *Law of Remedies*, section 4.9(4), page 482 (2d ed. 1993) regarding three-party transactions. MDU Opposition at 12-13. However, as Petitioners established in their appellate brief before the North Dakota Supreme Court, Dobbs' first "core idea" of restitution is "Defendant's gains, not Plaintiff's losses," which means that the defendant should be required to disgorge its ill-gotten gains, even if the plaintiff does not assert that he has been injured. Appendix H-12 to

13.[2] Thus, the decision under review fails to pass muster even under Dobbs' first "core idea."

Further, the Petitioners went on to provide six separate reasons why Dobbs' discussion of three-party transactions does not bar Petitioners' claims, including but not limited to the following: (1) that it only applies where the parties could have contracted with each other but didn't do so, and it was not established on summary judgment that this was the case here; (2) it is from a section of Dobbs concerning "improvements by subcontractors," which is a materially different situation; and (3) it applies only where the parties voluntarily agree to limit their remedies by contract, which did not occur here. Appendix H-13 to 19.

An action is arbitrary and capricious if it is undertaken for reasons unrelated to its proper purpose. The purpose of unjust enrichment is restitution, and it is squarely inconsistent with restitution for the North Dakota Supreme Court to deny Petitioners' causes of action and thereby enable MDU to retain many millions of dollars of damages attributable to its judicially determined breaches of contract. This is especially true because MDU successfully represented to the trial court and the Eighth Circuit in *Koch v. MDU* that gas producers such as the Petitioners were the ones who had sustained the economic losses and had its liability to Koch reduced 75% as a result. This would in fact be the essence of unjust enrichment. Clearly, no legitimate restitutionary purpose is served by the North Dakota Supreme Court's decision in this case.

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[2] Petitioners apologize to the Court for some unintended errors in printing the Petition for Writ of Certiorari and its attachments. For example, the printers failed to make appropriate paragraph breaks and to separately set forth the headings contained in Petitioners' appellate brief.

4. DENIAL OF PETITIONERS' CAUSES OF ACTION AND CONTRACT RIGHTS WAS IMPERMISSIBLY PROTECTIONIST AND IMPROPERLY DISCRIMINATES IN FAVOR OF NORTH DAKOTA'S UTILITY AGAINST GAS PRODUCERS WHO RESIDE IN OTHER STATES.

MDU does not deny that it retains 75% of the damages attributable to breaches of contract that it has been found to have committed. MDU also does not dispute that it is the primary utility in North Dakota, although it asserts that it additionally provides some services in other states. MDU also does not deny that if MDU were to pay Petitioners their share of the $400 million of unrecovered breach of contract damages, it would seek to recover those costs from ratepayers in a relatively-sparcely populated state of North Dakota. MDU additionally does not dispute that Petitioners are neither incorporated in North Dakota nor have their principal places of business there.[3]

MDU asserts that the denial of Petitioners' causes of action is not the result of in-state protectionism but simply resulted from a fair and consistent application of state law. Petitioners addressed the state law issues in their Petition for Writ of Certiorari and will not repeat that here.[4] However, notwithstanding MDU's

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[3] The same is true of Apache Corporation and Snyder Oil Company, which were the plaintiff gas producers in *Apache Corp. v, MDU Resources Group, Inc.*, 603 N.W.2d 891 (1999).

[4] The Petitioners will, however, briefly address three fundamental errors in MDU's analysis. First, MDU asserts that the Petitioners were damaged by their percentage of proceeds contracts instead of by MDU's breaches of its contracts with Koch. This is erroneous, as Petitioners explained at page 10 of their Petition for Writ of

argument, there is no way that the state court's denial of Petitioners' causes of action can fairly and reasonably be understood as a correct application of restitution, which focuses on the disgorgement of ill-gotten gains.

Moreover, as the Petitioner's established in their Petition for Writ of Certiorari, a law can violate due process even if it does not expressly classify persons in a discriminatory manner. Rather, the courts should look at the law's practical effect in evaluating whether it

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Certiorari. Second, MDU also erroneously asserts at page 14 of its Opposition that *A&A Metal Bldgs. V. I-S, Inc.*, 274 N.W.2d 183 (N.D. 1978), holds that under North Dakota law, the defendant must receive "a benefit at the direct expense" of the plaintiff in order for the plaintiff to assert an unjust enrichment claim. Although the North Dakota Supreme Court noted at 274 N.W.2d 189 that the trial court had made such a finding, it instead characterized the governing standard as, "When a person has been unjustly enriched at the expense of another, he must make restitution to the other." 274 N.W.2d 189. This is the correct standard, and it supports Petitioners' claims in this case. Finally, like the North Dakota Supreme Court did in *Apache Corp. v.MDU Resources Group, Inc.*, 603 N.W.2d 891 (1999), MDU distorts the governing five element test for unjust enrichment in order to disallow Petitioners' and Apache's claims. As Petitioners explained at page 8 of the Petition for Writ of Certiorari, the third element is "A connection between the enrichment and the impoverishment," and the fourth element is "Absence of a justification for the enrichment and the impoverishment." Petitioners correctly satisfy these two separate elements separately. However, MDU asserts that there two separate elements should be combined for the first time and distorted in order to justify denying Petitioners' and Apache's causes of action. ("a party asserting a claim for unjust enrichment must establish that the claimed enrichment must be a 'benefit at the direct expense' of the complainant....") MDU Opposition at 14. Petitioners have addressed the three authorities that MDU incorrectly relies upon in support of this new requirement in this footnote and at pages 8-9 of the Petition for Writ of Certiorari. They simply do not support the determination under review.

is discriminatory, and a discriminatory effect is improper. Petition for Writ of Certiorari at 11. Using this practical approach, the state court action can only be understood as impermissibly discriminating in favor of the North Dakota state utility and against gas producers which reside out of state.

5. THE PETITION INDIRECTLY INVOLVES A CLAIM AGAINST KOCH.

Finally, Koch asserts that the Petition for Writ of Certiorari does not involve any claims against it, so if a writ is granted, it should not include Koch. This assertion is in error. One of Petitioners' claims is that Koch committed in writing to keep them apprised of "major developments" in *Koch v. MDU*, and that Koch failed to do so, so they did not intervene or take other actions to protect their rights. The North Dakota Supreme Court affirmed the trial court's grant of summary judgment on this claim expressly on the ground that even if Koch had honored its commitment to keep the Petitioners apprised of "major developments," there were no actions that they could have taken to protect their interests, because they didn't have any causes of action that they could have asserted against MDU. Appendix A-13. Therefore, if this Court determines that the North Dakota Supreme Court improperly denied Petitioners' their causes of action against MDU, it necessarily follows that the Petitioners are entitled to pursue their claims against Koch for dishonoring its written commitment concerning major developments.

The Petitioners anticipate that MDU would be primarily liable. However, Koch could also secondarily be liable, for example, if some portion of Petitioners'

claims against MDU were determined to be barred, such as by the statute of limitations.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and herein, the Petitioners respectfully submit that it should be granted.

Respectfully submitted,

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